

Order Granting Motion for Reconsideration  
P:\PRO-SE\SJ.JW\OLD ORDERS\HC.99\Queen21067\_recons.wpd

1 The Ninth Circuit held in Harris that a petitioner was entitled to equitable  
2 tolling because he had relied in good faith upon then-binding circuit precedent (later  
3 overruled by the Supreme Court) in making the tactical decision to delay filing his  
4 federal petition even though he could have filed it earlier. Harris, 515 F.3d at 1053.  
5 Like the prisoner in Harris, petitioner claims he relied on then-binding circuit  
6 precedent, *i.e.*, Dictado v. Ducharme, 244 F.3d 724 (9th Cir. 2001), while he was  
7 pursuing his remedies in the state courts.

8 The Ninth Circuit held in Dictado that the limitations period was tolled by  
9 the prisoner's diligent pursuit of his "properly filed" personal restraint petitions in  
10 state court. 189 F.3d at 891. However, the Supreme Court later stated in Pace that  
11 time limits are "filing conditions" and thereby found that "[b]ecause the state court  
12 rejected petitioner's [postconviction] petition as untimely, it was not 'properly filed,'  
13 and he is not entitled to statutory tolling under §2244(d)(2)." Pace v. DiGuglielmo,  
14 544 U.S. 408, 412-13 (2005) (quoting Carey v. Saffold, 536 U.S. 214, 226 (2002)).  
15 "When a postconviction petition is untimely under state law, 'that [is] the end of the  
16 matter' for the purposes of § 2244(d)(2)." Id. at 413. Therefore, Pace abrogated  
17 Dictado such that an untimely filed state habeas petition no longer tolled the  
18 AEDPA limitations period.

19 Like the instant case, the federal habeas petition in Harris was also dismissed  
20 as untimely under Pace. The Ninth Circuit reversed the district court's decision and  
21 found petition was entitled to equitable tolling based on the following:

22 Harris' circumstances justify equitable tolling under both our circuit's  
23 standard and the *Pace* standard. Harris diligently pursued his rights.  
24 He filed successive petitions for state post-conviction relief while  
25 ensuring that enough time would remain to file a federal habeas  
26 petition under the then existing *Dictado* rule. The Supreme Court's  
27 overruling of the *Dictado* rule made it impossible for Harris to file a  
timely petition. Harris' petition became time barred the moment that  
*Pace* was decided. Finally, Harris had no control over the operative  
fact that caused his petition to become untimely – the Supreme Court's  
decision in *Pace*. These are precisely the circumstances in which  
equitable principles justify tolling of the statute of limitations.

28 Harris, 515 F.3d at 1053.

1 The instant case is not unlike Harris. The parties stipulated that November  
2 14, 1997 would be the first day of petitioner's AEDPA year. Absent tolling,  
3 petitioner had one year, *i.e.*, until November 14, 1998, to file a federal habeas  
4 petition. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (calculating  
5 AEDPA's one-year limitation period according to Federal Rule of Civil Procedure  
6 6(a)). The limitations period ran for 166 days before petitioner filed a state habeas  
7 petition on April 29, 1998, which was denied by the state superior court on May 27,  
8 1998. Petitioner sought review in the state court of appeal 86 days later on August  
9 21, 1998, and was denied on February 17, 1999. (Pet. Ex. E.) Then 71 days later,  
10 petitioner filed the petition in the state high court on April 29, 1999, and was denied  
11 on July 28, 1999. (Pet. Ex. F.) Petitioner then filed the instant habeas petition 90  
12 days later on October 26, 1999. The Court found that petitioner was not entitled to  
13 gap tolling for any period of time period after February 17, 1999, because the state  
14 petition to the California Supreme Court was denied as untimely and therefore not a  
15 properly filed petition nor pending within the meaning of § 2254(d)(2). (See Docket  
16 No. 63 at 6.) Under Dictado, however, petitioner would have been entitled to tolling  
17 for the entire period his petition was pending in state courts, notwithstanding the fact  
18 that the last petition was denied as untimely, *i.e.*, from April 29, 1998, when he filed  
19 his state habeas petition in superior court, until July 28, 1999, when the state high  
20 court denied review. See Carey, 536 U.S. at 221-23. Petitioner therefore would  
21 have had a remaining 199 days to file a timely federal habeas petition, *i.e.*, no later  
22 than February 12, 2000. Petitioner filed the instant petition on October 26, 1999.  
23 Similar to Harris, petitioner's federal habeas petition would have been timely but for  
24 the Supreme Court decision in Pace.

25 Based on the recent Ninth Circuit decision in Harris v. Carter, this Court finds  
26 cause to reconsider its order granting respondent's Motion to Dismiss. Accordingly,  
27 petitioner's motion for reconsideration (Docket No. 66) is GRANTED. The Order  
28 Granting Motion to Dismiss, (Docket No. 63), and Judgment, (Docket No. 64), are

VACATED. The case shall proceed on the merits.

Petitioner alleges the following claims as grounds for federal habeas relief:

(1) trial counsel rendered ineffective assistance; (2) appellate counsel was ineffective; (3) the trial court “erred” in specified ways; and (4) the prosecutor engaged in misconduct in closing argument. Liberally construed, petitioner’s claims appear cognizable under § 2254 and merit an answer from respondent.

Pro bono counsel was appointed for the limited purpose of representing petitioner in connection with the issues addressed in the Court order filed May 22, 2006, *i.e.*, whether petitioner was entitled to equitable tolling, in accordance with the Ninth Circuit’s ruling on remand. (See Docket No. 44.) The issue of equitable tolling having been settled, appointment of counsel is no longer necessary. Accordingly, pro bono counsel is terminated. Petitioner shall proceed in pro se in this action.

### CONCLUSION

For the foregoing reasons and for good cause shown,

1. The clerk shall reopen the file. The clerk shall serve by certified mail a copy of this order on the Attorney General of the State of California. The clerk shall also mail a copy to the Federal Public Defender’s Office in San Jose as notice of the termination of pro bono counsel.


2. Respondent shall file with the court and serve on petitioner, within **ninety (90) days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

If petitioner wishes to respond to the answer, he shall do so by filing a

1 traverse with the court and serving it on respondent within **forty-five (45) days** of  
2 his receipt of the answer.

3 Petitioner is reminded that all communications with the court must be served  
4 on respondent by mailing a true copy of the document to respondent's counsel.  
5 Petitioner must also keep the court and all parties informed of any change  
6 of address.

7  
8 DATED: March 11, 2009

  
9 JAMES WARE  
10 United States District Judge  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

CHARLES VANEY QUEEN,

Petitioner,

v.

ANTHONY C. NEWLAND, Warden,

Respondent.

Case Number: CV99-21067 JW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 3/13/2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Barry L. Morris  
1260 B Street, Suite 220  
Hayward, CA 94541

Dated: 3/13/2009

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk